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ABSTRACT

This testimony was delivered by William Bradford Reynolds, the Assistant Attorney General of the Civil Rights Division, before the Subcommittee on Separation of Powers, Committee on the Judiciary of the United States Senate. Reynold states that compulsory busing of students is not an acceptable remedy to achieve racial balance. He emphasizes the responsibility of state and local school boards to formulate educational policies in accordance with Titles IV, VI and IX of the Civil Rights Act of 1964 as well as the Equal Education Opportunity Act of 1974. Reynolds argues for alternative solutions to achieve school desegregation. In developing specific remedial techniques, Reynolds cites the Department of Justice's intent to thoroughly investigate the background of every racially identifiable school in a district to determine whether the racial segregation is de jure or de facto. Reynolds also states that the Department further recognizes several desegregation approaches that seem most promising: voluntary student transfer programs, magnet schools, enhanced curriculum requirements, faculty incentives, inservice training programs for teachers and administrators, school closings in systems that are overcrowded, and adjustments to attendance zones. (JCD)

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Department of Justice

TESTIMONY OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE THE

SUBCOMMITTEE ON SEPARATION OF POWERS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

DESEGREGATION OF PUBLIC SCHOOLS

OCTOBER 16, 1981

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Thank you for inviting me to testify on the critically important subject of school desegregation. Few contemporary domestic issues command as much public attention as the question of how this Administration and this Congress plan to respond to the problem of unconstitutional racial segregation of our public schools. Virtually everyone, I believe, agrees with the ultimate objective -- that is, complete eradication of state-imposed racial segregation. Moreover, we all probably can agree that the achievement of this objective is central to the constitutional promise of equal protection of the laws.

In recent years, however, we have witnessed growing public disenchantment with some of the remedies used to accomplish the constitutional imperative of eliminating racial discrimination in public schooling. The hearings being conducted by this Subcommittee underscore an increased public awareness of the need to develop enlightened and forward-looking school desegregation remedies and to eliminate those techniques which have in too many instances proved ineffective, and even counterproductive, in the past.

To this end, this Subcommittee is currently considering several bills dealing with the subject of school desegregation. While the remedial formulas contained in these bills differ in a number of respects -- both in terms of the procedural approach suggested and in terms of the substantive relief contemplated -- all sound the same theme: compulsory busing

of students in order to achieve racial balance in the public schools is not an acceptable remedy.

As a matter of Administration policy, this theme has been endorsed by the President, the Vice President, the Secretary of Education, the Attorney General, and me. The Administration is thus clearly and unequivocally on record as opposing the use of mandatory transportation of students as an element of relief in future school desegregation cases. Stating our opposition to compelled busing, however, is but a starting point in developing just and sound policies to achieve the central aim of school desegregation -- equal education opportunity. If mandatory busing is not an acceptable tool with which to combat unconstitutional racial segregation of our public schools, it is incumbent upon all branches of government to develop reasonable and meaningful alternatives designed to remove remaining state-enforced racial barriers to open student enrollment and to ensure equal education opportunity for all, without regard to race, color or ethnic origin.

It is in the area of developing just such meaningful alternative approaches, to accomplish to the fullest extent practicable the desegregation of unconstitutionally segregated public schools, that we at the Department of Justice have been concentrating our attention in recent months. Since this Subcommittee is engaged in much the same effort through the legislative process, I am pleased to have this opportunity

to share with you the thoughts and tentative conclusions resulting from our analysis to date.

Let me note at the outset that my remarks today are directed only to the policy considerations raised by the several bills currently before this Subcommittee. Other questions have been raised regarding the constitutionality of legislation that seeks to restrict the jurisdictional authority of federal courts to order certain relief. Those complex constitutional issues are being carefully scrutinized by the Department of Justice. Because that review has not yet been completed, I will, for the present, place to one side all discussion relating to the constitutional implications of the several bills in question, and turn my attention solely to the remedial considerations under development by this Administration to vindicate the constitutional and statutory requirements of equal education opportunity. I hope that this Subcommittee will find the Administration's analysis -- and the policies borne of that analysis -- useful in its consideration of appropriate legislation in this area.

The Department's responsibility in the field of school desegregation derives from Titles IV, VI and IX of the Civil Rights Acts of 1964, as well as the Equal Education Opportunity Act of 1974. It is important to emphasize that these statutes do not authorize the Department of Justice to formulate education policy. Nor could they, for under our federal

system, primary responsibility for formulating and implementing education policies is constitutionally reserved to the states and their local school boards. In carrying out this responsibility, however, the states cannot transgress constitutional bounds, and the Department's basic mission under these federal statutes, a mission to which this Administration is fully committed, is to enforce the constitutional right of all children in public schools to be provided an equal education opportunity, without regard to race, color or ethnic origin.

In discussing with you the particulars of how we intend to enforce this constitutional right, it is important to frame the discussion in proper historical perspective. Brown v. Board of Education, 347 U.S. 483 (1954), is, of course, the starting point. In Brown, the Supreme Court held that even though physical facilities and other tangible elements of the educational environment may be equal, state-imposed racial segregation of public school students deprives minority students of equal protection of the laws. Id. at 493. Casting aside the shameful "separate-but-equal" doctrine established some 84 years earlier in Plessy v. Ferguson, 110 U.S. 537 (1896), the Court held that state-imposed racial separation inevitably stigmatizes minority students as inferior. Id. at 494. The Court concluded, therefore, that state-enforced racially separated education facilities are inherently unequal. Id. at 495.

One year after the initial decision in Brown, the Supreme Court, in Brown II, ordered that the Nation's dual school systems be dismantled "with all deliberate speed." Brown v. Board of Education, 349 U.S. 294, 300-301 (1955) (Brown II). The goal of a desegregation remedy, the Court declared, is the admission of students to public schools on a "racially nondiscriminatory basis." Ibid.

During the period following Brown II, state and local officials engaged in widespread resistance to the Court's decision; thus, few jurisdictions made any real progress towards desegregation. In 1968, thirteen years after Brown II, the Supreme Court's patience ran out. In Green v. County School Board, 391 U.S. 430 (1968), the Court was confronted with a "freedom-of-choice" plan that had the effect of preserving a dual system. In disapproving this plan, the Court made clear that a desegregation plan must be judged by its effectiveness in disestablishing state-imposed segregation. Id. at 439. The burden on a school board that has operated a dual system, the Court explained, "is to come forward with a plan that promises realistically to work and promises realistically to work now." Ibid.

In neither Brown nor Green, however, did the Court assert that racial balance in the classroom is a constitutional requirement or an essential element of the relief necessary to redress state-enforced segregation in public schools.

Rather, the Court held simply that the Constitution requires racially nondiscriminatory student assignments and eradication of the segregative effects of past intentional racial discrimination by school officials.

Because of the problems encountered by the lower courts in implementing the Green decision, the Supreme Court returned to the subject of a school board's remedial obligations three years later in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). Swann specifically rejected any "substantive constitutional right [to a] particular degree of racial balance" (id. at 24), and reiterated that the basic remedial obligation of school boards is "to eliminate from the public schools all vestiges of state-imposed segregation." Id. at 15. For the first time, however, the Court authorized use of mandatory race-conscious student assignments to achieve this objective, explaining that racially neutral measures, such as neighborhood zoning, may fail to counteract the continuing effects of past unconstitutional segregation. Id. at 27-28. Moreover, in light of the prevalence of bus transportation in public school systems, the Swann Court upheld the use of mandatory bus transportation as a permissible tool of school desegregation. Id. at 29-30.

Thus, in what has proved to be the last unanimous opinion by the High Court in the school desegregation area, the first tentative step was taken down the remedial road of court-ordered, race-conscious pupil assignments and transportation.

Since then, that road has been traversed involuntarily more and more often by the yellow school bus because of a preoccupation with racial ratios in the classroom as a desegregation remedy.

What is interesting to note, however, is that the Swann Court spoke in measured terms, expressing reserved acceptance of busing as but one of a number of remedial devices available for use when, and these are the Supreme Court's words, it is "practicable," "reasonable," "feasible," "workable," and "realistic." The Court clearly did not contemplate indiscriminate use of busing without regard to other important, and often conflicting, considerations. Indeed, the Swann Court, emphasizing the multiple public and private interests that should inform a desegregation decree, expressed disapproval of compulsory busing that risks the health of students or significantly impinges on the educational process, made clear that busing can be ordered only to eliminate the effects of state-imposed segregation and not to attain racial balance in the schools, and tacitly admonished courts to rely on experience in exercising their equitable remedial powers.

Today, a decade after Swann, there is ample reason to heed that admonition. Justice Oliver Wendell Holmes counseled wisely, in his book The Common Law, that "the life of the law has not been logic, it has been experience." Unlike 1971, when no court had any empirical evidence on which to assess the advisability or effectiveness of mandatory busing, now we have 10 years of experience and the results of hundreds of busing decrees on which to draw in formulating current

desegregation policies. It is against this backdrop that courts, legislators, and the public must -- as Swann itself signaled -- now reconsider the wisdom of mandatory busing as a remedy for de jure segregation.

Few issues have generated as much public anguish and resistance, and have deflected as much time and resources away from needed endeavors to enrich the educational environment of public schools, as court-ordered busing. The results of numerous studies aimed at determining the impact of busing on educational achievement are at best mixed. There has yet to be produced sufficient evidence showing that mandatory transportation of students has been adequately attentive to the seemingly forgotten "other" remedial objective of both Brown and Swann; namely, establishment of an educational environment that offers an equal education opportunity to every school child, irrespective of race, color, or ethnic origin. In his May address to the American Law Institute, Attorney General William French Smith accurately commented on the accumulated evidence in this area in the following terms:

> Some studies have found negative effects on achievement. Other studies indicate that busing does not have positive effects on achievement and that other considerations are more likely to produce significant positive influences.

> In addition, in many communities where courts have implemented busing plans, resegregation has occurred. In some instances upwardly mobile whites and blacks have merely chosen to leave the urban environment. In other instances, a concern for the quality of the schools their children attend has caused parents to move beyond the reach of busing orders. Other parents have chosen to enroll their children in private schools that they consider better able to provide a quality education. The desertion of our cities' school system has sometimes eliminated any chance of achieving racial balance even if intra-city busing were ordered.

These lessons of experience have not been lost on some judges, including members of the Supreme Court, where opinion in this area is now sharply divided. For example, Justice Lewis Powell recently remarked in dissent in the Estes case:

> This pursuit of racial balance at any cost . . . is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one race schools, courts may produce one race systems. */

The flight from urban public schools has contributed to the erosion of the tax base of a number of cities, which has in turn had a direct bearing on the growing inability of many school systems to provide a quality education to their students -- whether black or white. Similarly, the loss

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*/ Estes v. Metropolitan Branches of the Dallas NAACP, 444 U.S. 437, 450 (1980) (Powell, J., joined by Stewart and Rehnquist, J. J., dissenting from dismissal of certiorari as improvidently granted).

of parental support and involvement -- which often comes with the abandonment of a neighborhood school policy -- has robbed many public school systems of a critical component of successful educational programs. There is, in addition, growing empirical evidence that educational achievement does not depend upon racial balance in public schools.

To be sure, some communities have accepted mandatory busing, thus avoiding some of its negative effects. Unfortunately, however, calm acceptance of mandatory busing is too often not forthcoming; and, plainly, the stronger the parental and community resistance, the less effective becomes a compulsory student transportation plan.

One of the principal objections to busing is that courts -- frequently relying on the advice of experts -- have largely ignored the measured terms of the Swann decision and have employed busing indiscriminately, on the apparent assumption that the cure-all for past intentional segregative acts is to reconstitute all classrooms along strict racial percentages. Not even in a perfect educational world would one expect to find every school room populated by precise racial percentages that mirror the general population.

Mandatory busing has also been legitimately criticized on the grounds that it has been employed in some cases to alter racial

imbalance that is in no way attributable to the intentionally segregative acts of state officials. In Keyes v. Denver School District, 413 U.S. 189 (1973), the Supreme Court held that a finding of state-imposed racial segregation in one portion of a school system creates a presumption that racial imbalance in other portions of the system is also the product of state action. To avoid imposition of a system-wide desegregation plan, which often includes system-wide busing, a school board subject to the Keyes presumption must shoulder the unrealistic burden of proving that racial balance in other areas of the system is not attributable to the state. Consequently, the application of Keyes has in my view resulted in system-wide transportation remedies that in some instances encompass not only de jure, or state-imposed, segregation, but de facto segregation as well.

Sobered by this experience, the Administration has reexamined the remedies employed in school desegregation cases. Stated succintly, we have concluded that involuntary busing has largely failed in two major respects: (1) it has failed to elicit public support and (2) it has failed to advance the overriding goal of equal education opportunity. Adherence to an experiment that has not withstood the test of experience obviously makes little sense.

Accordingly, the Department will henceforth, on a finding by a court of de jure racial segregation, seek

a desegregation remedy that emphasizes the following three components, rather than court-ordered busing:

(i) removal of all state-enforced racial barriers to open access to public schools;

(ii) insurance that all students -- white, black, hispanic or of any other ethnic origin -- are provided equal opportunities to obtain an education of comparable quality;

(iii) eradication to the fullest extent practicable of the remaining vestiges of the prior dual systems.

To accomplish this three-part objective, we have developed, I think, a coherent, sound, and just litigation policy that will ensure fair enforcement of the civil rights laws, eliminate the adverse results attending percentage busing, and make educational issues the foremost consideration.

As part of that litigation policy, the Department will thoroughly investigate the background of every racially identifiable school in a district to determine whether the racial segregation is de jure or de facto. In deciding to initiate litigation we will not make use of the Keyes presumption, but will define the violation precisely and seek to limit the remedy only to those schools in which racial imbalance is the product of intentionally segregative acts of state officials. And all aspects of practicability, such as disruption to the education process, community acceptance, and student safety, will be weighed in designing a desegregation remedy.

In developing the specific remedial techniques to accomplish this three-part objective, we recognize that no single desegregation technique provides an answer. Nor does any particular combination of techniques offer the perfect remedial formula for all cases. But some desegregation approaches that seem to hold promise for success include: voluntary student transfer programs; magnet schools; enhanced curriculum requirements; faculty incentives; in-service training programs for teachers and administrators; school closings in systems with excess capacity and new construction in systems that are over-crowded; and modest adjustments to attendance zones. The overarching principle guiding the selection of any or all of these remedial techniques -- or indeed resorting to others that may be developed -- is equal education opportunity.

Let me add that our present thinking is to give this approach prospective application only. We thus do not contemplate routinely reopening decrees that have proved effective in practice. The law generally recognizes a special interest in the finality of judgments, and that interest is particularly strong in the area of school desegregation. Nothing we have learned in the 10 years since Swann leads to the conclusion that the public would be well served by reopening wounds that have long since healed.

On the other hand, some school districts may have been successful in their efforts to dismantle the dual systems of an earlier era. Others might be able to demonstrate that circumstances within the system have changed to such a degree that continued adherence to a forced busing remedy would serve no desegregative purpose. Certainly, if, in the wake of white flight or demographic shifts, black children are being bused from one predominantly black school to another, the school system should not be required to continue such assignments. A request by the local school board to reopen the decree in such circumstances would in my view be appropriate, and the Justice Department might well not oppose such a request so long as we are satisfied that the three remedial objectives discussed above will not be compromised.

There is another dimension to the Administration's current school desegregation policy that deserves mention. Apart from the issue of unconstitutional pupil assignments, experience has taught that identifiably black schools sometimes receive inferior educational attention. Whatever the ultimate racial composition in the classroom, the constitutional guaranty of equal education opportunity prohibits school officials from intentionally depriving any student, on the basis of race, color, or ethnic origin, of an equal opportunity to receive an education comparable in quality to that being received by other students in the school district.

Deliberately providing a lower level of educational services to identifiably black schools is as invidious as deliberate racial segregation. Evidence of such conduct by state officials might include disparities in the tangible components of education, such as the level and breadth of academic and extracurricular programs, the educational achievement and experience of teachers and administrators, and the size, age, and general conditions of physical facilities.

Indeed, Swann itself held that, independent of student assignment, where it is possible to identify a black school "simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown." 402 U.S. at 18. The Court explained that the proper remedy in such cases is to "produce schools of like quality, facilities, and staffs." Id. at 19. Despite the recognition of this constitutional right by a unanimous Court in Swann, suits have rarely been brought to redress such wrongs.

In pursuing constitutional violations of this kind, the Justice Department in no way intends to second-guess or otherwise intrude into the educational decisions and policymaking of state education officials. That function, as I have previously made clear, is reserved to the states. And in many cases substantial disparities in the tangible components of

education may well be attributable to legitimate, racially nondiscriminatory factors. But when such disparities are the product of intentional racial discrimination by state officials, can it seriously be maintained that the educationally disadvantaged students are being afforded equal protection of the laws? Our future enforcement policies will be aimed at detecting and correcting any such constitutional violations wherever they occur.

In sum, the Administration remains firm in its resolve to ferret out any and all instances of unlawful racial segregation and to bring such practices to a halt. We do not believe that successful pursuit of that policy requires resort to a desegregation remedy known from experience to be largely ineffective and, in many cases, counterproductive. The school desegregation bills currently being considered by this Subcommittee suggest a similar attitude on the part of members of the Senate. To the extent that those bills seek to restrict the use of mandatory student transportation as a tool of school desegregation, they reflect the thinking of the Administration in this area.

I would sound only one cautionary note. In framing legislation aimed at eliminating, or severely limiting, the use of forced busing as an available remedial tool, care should be taken not to draft the statutory prohibition so broadly that it bans as well other desegregation techniques which have <u>not</u> been shown to be ineffective or counterproductive in combating state-imposed racial segregation

of our public schools. In this regard, a legislative prohibition against inferior federal courts ordering transportation of students to obtain racial balance in the schools need not, in our view, also preclude use of other remedial techniques such as school closings in systems with excess capacity or involuntary transfers of teachers to break up state-created racially identifiable faculties.

The evidence currently available to the Department of Justice indicates that school closings and teacher transfers may in some instances assist effectively in eliminating the vestiges of racially discriminatory dual school systems. Nor does the Department have information suggesting that these desegregation techniques are attended by any of the adverse consequences often associated with mandatory student transportation. Accordingly, we would hope that the Sub-committee, in its consideration of appropriate anti-busing legislation, would hesitate before eliminating desegregation methods which, unlike mandatory busing, have been usefully employed in the past to assist in vindicating the constitutional guaranty of equal education opportunity for all public school students, regardless of race, color or ethnic origin.

In closing, let me state that this Administration will tirelessly attack state-imposed segregation of our Nation's public schools on account of race, color or ethnic origin. The Department's mission continues to be the prompt and

complete eradication of de jure segregation. While the relief we seek may differ in certain respects from the remedies relied upon by our predecessors, the Department of Justice will not retreat from its statutory and constitutional obligation to vindicate the cherished constitutional guaranty of equal education opportunity.

Thank you. Mr. Chairman, I would be happy to respond to questions that you or other members of the Subcommittee may have.